No. 79027-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 55342-9-I

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent/Cross-Petitioner,

v.

DAN PAULSON CONSTRUCTION, INC., a Washington corporation, KAREN and JOSEPH MARTINELLI, and the marital community composed thereof,

Petitioners/Cross-Respondents.

PETITIONERS/CROSS-RESPONDENTS' MOTION TO STRIKE NEW ISSUE RASIED FOR THE FIRST TIME IN RESPONDENTS' SUPPLEMENTAL BRIEF

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I. Identity of Moving Party:

Joseph and Karen Martinelli, petitioners and cross-respondents, file this motion to strike.

II. Relief Requested:

Petitioners/cross-respondents ask the Court to strike pages 6-9 from respondent/cross-petitioner Mutual of Enumclaw's Supplemental Brief because it raises a new issue for the first time in a Supplemental Brief, in violation of RAP 2.5(a) and RAP 13.7(a), (b), and (c).

III. References to Parts of the Record Relevant to the Motion:

This motion to strike relates to pages 6-9 of Mutual of Enumclaw's Supplemental Brief filed in this Court. This motion to strike also references trial court pleadings and rulings found at CP 13-14, 486, 492-93, 649, 910-12, 932-33, 949-52, 956, and 971-2. This motion also points out the absence of any reference to "unclean hands" in Mutual of Enumclaw's Opening (pp. 30-37) and Reply Briefs (pp. 10-17) in the Court of Appeals and its Answer to the Petition for Review in this Court (pp. 9-16).

IV. Statement of Grounds Supporting Relief Sought:

Mutual of Enumclaw's Supplemental Brief, for the first time, argues that the trial court judgment should be reversed and the Court of Appeals decision affirmed, based on the CR 8(c) affirmative defense of "unclean hands." Supp. Br., pp. 6-9. Mutual of Enumclaw asserts for the first time that its insured, Dan Paulson construction, engaged in misconduct and, as a matter of equity, "[t]he Court should announce a rule which disapproves the very type of gamesmanship in which Paulson and his coverage counsel[1] engaged," by holding that "coverage by estoppel is precluded." MOE Supp. Br., pp. 6, 7, 9.

However, Mutual of Enumclaw has *never* before urged "unclean hands" as an affirmative defense to coverage by estoppel—not in this Court, the Court of Appeals, or the trial court. Ans. to the Pet. for Rev., pp. 9-16; Opening Br. (Court of Appeals), pp. 30-37, Reply Br. (Court of Appeals), pp. 10-17. Pursuant to RAP 2.5(a), and RAP 13.7(b), the Court will not consider an issue "raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition

1 Mutual of Enumclaw refers to "coverage counsel," even though Paulson's assigned counsel, Greg Jones, retained by MOE to represent Paulson under a reservation of rights, acted as Paulson's lead counsel in *all* matters about which MOE now complains.

for review or the response to the petition." *Sorensen v. Pyeatt,* 158 Wn.2d 523, 542-43, 146 P.3d 1172 (2006). Accord, *Douglas v. Freeman,* 117 Wn.2d 242, 258, 814 P.2d 1160 (1991). The Court also will not consider an issue raised for the first time in the supplemental brief when it was not raised in the court below. *Sorensen, supra,* 158 Wn.2d at 542-43.

Mutual of Enumclaw's trial court pleadings also do not raise the affirmative defense of "unclean hands." CP 13-14, 956 ¶2. The closest Mutual of Enumclaw came to asserting such a defense was its assertion in the trial court that Dan Paulson Construction violated the "cooperation clause" of the insurance policy [CP 13 ¶2 and 956 ¶2, 910-12, 949-952], an argument Mutual of Enumclaw abandoned in the Court of Appeals. MOE Opening Br., pp. 30-37, Reply Br., pp. 10-17.

Mr. and Mrs. Martinelli refuted Mutual of Enumclaw's "cooperation clause" argument in the trial court.[2] CP 930-32. See further, CP 486 n. 7 and 492-3. The trial court rejected Mutual of Enumclaw's "cooperation clause" argument. CP 649, 971-2. Mutual of Enumclaw thereafter chose not to raise the alleged breach of the cooperation clause as

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2 As occurred in *Sorensen, supra,* the fact that Mutual of Enumclaw asserted its "cooperation clause" contract defense in the trial court also illustrates that "equity will not intervene where there is an adequate remedy at law." *Sorensen, supra,* 158 Wn.2d at 543.

an issue in the Court of Appeals. MOE Opening Br., pp. 30-37, Reply Br., pp. 10-17. See, RAP 13.7(b) and *Sorensen, supra,* 158 Wn.2d at 543.

Having abandoned *any* issue of its insured's alleged breach of duty in the Court of Appeals, Mutual of Enumclaw may not now argue for the first time in this Court that its insured was guilty of "unclean hands" in an attempt to avoid liability for its bad faith interference with its insured's defense.

CONCLUSION

The Court should therefore strike pages 6-9 from Mutual of Enumclaw's Supplemental Brief as improper argument that violates RAP 2.5(a) and RAP 13.7(a), (b), and (c).

Respectfully submitted this 9th day of May, 2007.

LAW OFFICES OF ROBERT B. GOULD

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